



No. 352

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U. S. SUPREME COURT
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In the Supreme Court of the United States

OCTOBER TERM, 1940

SUNSHINE MINING COMPANY,
a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF SUPPORTING PETITION FOR CERTIORARI

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BRIEF SUPPORTING PETITION FOR CERTIORARI

OPINIONS BELOW

The original findings of fact, conclusions of law, and order of the Board (R. 217-258) are reported in 7 N. L. R. B. 1252. The opinion of the Circuit Court of Appeals (R. 3191) is reported in 110 F. (2d) 780.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on April 3, 1940 (R. 3228). A petition for rehearing filed by Petitioner was granted June 7, 1940 (R. 3233). The decree was confirmed without specification of reason June 19, 1940 (R. 3235). The jurisdiction of this Court is invoked under Title 28 U. S. C. Sec. 347, and Sections 10(e)

and (f) of the National Labor Relations Act, Title 29 U. S. C. Sec. 160.

STATEMENT

Petitioner adopts the statement of the case made in its petition herewith (pp. 5 to 22) as the statement in this brief.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred:

1. In holding that the Board had jurisdiction.
2. In not holding that Petitioner had been deprived of procedural due process of law.
3. In not holding that the awarding of back pay to all strikers commencing with August 18, 1937, deprived Petitioner of its property without due process of law.
4. In not holding that the Board had abused its discretion (to order affirmative action to effectuate the policies of the Act) in ordering Petitioner to reinstate all strikers with back pay since August 18, 1937.
5. In holding that there was substantial evidence that the Union represented a majority of Petitioner's mine and mill employees in June, July and August, 1937, that such employees constituted an appropriate unit and that Petitioner refused to bargain with the Union as the representative of that unit.
6. In holding that the Board's order requiring Peti-

tioner to bargain with the Union as the representative of its mine and mill employees should be enforced, though at the date of the hearing the Union did not represent a majority of the unit defined.

SCOPE OF BRIEF

Petitioner submits all questions and specifications of error upon its petition for writ of certiorari, except the questions of jurisdiction, denial of due process of law, and lack of substantial evidence to support findings of unit, majority and refusal to bargain. Petitioner believes that the other questions are sufficiently covered in the petition, but that the questions of jurisdiction and the Board's procedure and findings merit, if they do not demand, amplification.

ORDER OF BRIEF

Part One will consider the question of interstate commerce and the Board's findings with reference to jurisdiction.

Part Two will consider the Board's procedure and its findings with reference to the appropriate unit, the majority status of the Union as the exclusive representative of that unit, and the question of whether or not there has been a refusal to bargain under the statute.

ARGUMENT

I. THE ACT IS NOT APPLICABLE TO PETITIONER'S OPERATIONS

To support the drastic extension of its authority to this case, the Board must assume the burden of demonstrating clearly and definitely,¹ and through express and complete findings of fact² that a diminution, interruption or stoppage of Petitioner's activities would necessarily result in an immediate, direct and substantial diminution, injury or stoppage of interstate commerce; and that there is an unbroken chain of causation between its activities and in-

¹ Since the attempt is to exert the Federal power within what would otherwise be the domain of state power, the justification for the exercise of Federal power must clearly appear. *Florida v. United States*, 282 U. S. 194, 211, 212; *Illinois C. R. Co. v. Public Utilities Com.*, 245 U. S. 493, 510; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 223.

² National Labor Relations Act, Sec. 10(c); ". . . the validity of the order must rest upon the needed finding." *Wichita Railroad & L. Co. v. Public Utilities Com.*, 260 U. S. 48, 59. And the findings must be formal, explicit, express and definite. *Saginaw Broadcasting Co. v. Federal C. Com.*, 96 F. (2d) 554, 559; certiorari denied 305 U. S. 613. *Baltimore & O. R. Co. v. United States*, 22 Fed. Supp. 533, 537. 38 Columbia L. Rev., 978, 988. Lack of express findings by an administrative agency may not be supplied by implication. *Atchison T. & S. F. R. Co. v. United States*, 295 U. S. 193, 202. "The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission, but to ascertain whether its findings are properly supported." *Florida v. United States*, 282 U. S. 194, 215. An order based upon inadequate findings is a denial of due process. *West Ohio Gas Co. v. Public Utilities Com.*, 294 U. S. 63, 69, 70. See, also, *Heitmeyer v. Federal C. Com.*, 95 F. (2d) 91.

terstate shipments without an active, efficient, intervening agency.³

To establish its jurisdiction the Board apparently places primary and independent reliance upon the claim that Petitioner purchases supplies and equipment for its operations through the channels of interstate commerce. This claim is not supported by the Board's findings of fact. The Board's only finding upon this subject was, "In 1936, the respondent purchased supplies, equipment, electrical current, machinery and other materials used in its operations amounting to approximately \$700,000. Approximately 60 per cent of these purchases came from sources outside the State of Idaho." (R. 221). This is not a finding that Petitioner purchased supplies and equipment through the channels of interstate commerce, but merely that the supplies and equipment purchased originated outside the state. Nor is the rule of this Court with respect to findings of fact satisfied by "implying" or "inferring" from the Board's finding a purchase by the Petitioner through the channels of interstate commerce. See *Atchison T. & S. F. R. Co. v. United States*, *supra*. Nor by reference to the record. *Florida v. United States*, *supra*.

³ *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 543; *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37; *Carter v. Carter Coal Co.*, 298 U. S. 238, 307, 308; *Santa Cruz Fruit Packing Co. v. National Labor Relations Bd.*, 303 U. S. 453, 466, 467; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 604; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 223.

Certainly it is not necessary to argue that jurisdiction cannot rest on the mere fact that supplies and equipment "originated" in other states. Into a Federal maw, if it were otherwise, would come every activity where men are employed.

Even if the Board had made findings which supported this claim its jurisdictional position would have been no better, because the claim itself has no support in the decisions nor in relevant principle. In fact, in view of *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, it is surprising that the contention is made at all. In that case, where all the purchases came from, and some were directly made outside the state, this Court said (p. 543):

"The poultry had come to a permanent rest within the State. It was not held, used or sold by the defendants in relations to any further transactions in interstate commerce and was not destined to other States. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here."

The supplies and equipment in this case did not subsequently move in interstate commerce, nor are they destined to other states in any form. They are, in fact, either used up or worn out in mining ore within the state. They came to a permanent point of rest within the state. They are not part of a "practical continuity of movement." The *Schechter* case sets a definite limit of jurisdiction, as

does the *Jones & Laughlin* case where the materials imported were made into the product exported by the employer; when the materials came into the state, they were destined to other states, being at all times in control of the employer who was to introduce them into interstate commerce. And in *National Labor Relations Bd. v. Bradford Dyeing Assn.*, No. 588, Oct. Term 1939, decided May 20, 1940, the goods imported became part of the product which was actually shipped in interstate commerce on completion by the employer. In only one decision, the *Consolidated Edison* case, has this Court even referred to purchase of supplies and equipment in discussing the jurisdiction of the Board, and in that case the Court laid such facts "on one side" without indicating whether they were material upon the jurisdictional question.

The decisions of the lower Federal courts but emphasize the limitation fixed by this Court in the *Schechter* case.⁴

The case of *National Labor Relations Bd. v. Idaho-Maryland Mines*, 98 F. (2d) 129, 131, a decision of the Ninth

⁴ Mooresville Cotton Mills v. National Labor Relations Bd., 94 F. (2d) 61, 62, Newport News Shipbuilding & Dry Dock Co. v. National Labor Relations Bd., 101 F. (2d) 841, 843, were concerned with raw materials which became part of the product shipped in interstate commerce. While the Newport News case refers to equipment, the equipment was used for repair work on interstate instrumentalities. National Labor Relations Board v. Abell, 97 F. (2d) 951, 954, directly involved raw materials, and the "supplies" (information and advertisements) were the very subject matter of an interstate business and used substantially in the form in which they were secured.

Circuit, is directly in point. In that case, the finding of the Board with reference to importation of supplies and equipment was as follows:

"The record indicates that the respondent annually purchased supplies and equipment produced in and transported from points outside of the State of California, to an amount in the neighborhood of \$125,000." 4 N. L. R. B., p. 789 (1938).

This finding is even stronger for jurisdiction than the finding made by the Board in the instant case, yet the Ninth Circuit Court held that such purchases did not confer jurisdiction.

The Board's "interstate supplies" position can be sustained only if this Court rejects the rule of the *Schechter* case and the "direct effect" requirement and adopts the *sine qua non* theory of causation. That theory would bring within the Board's jurisdiction every activity which may be said to be a necessary or natural preliminary to production. For instance, the employees of a local contractor erecting a building to be used for the production of goods to be shipped in interstate commerce would be within the Act if the employer bought from outside the state hammers, saws and other equipment necessarily used in the erection of the building. It is true the contractor, as in the instant case, is only next in line to the shipper, but if jurisdiction depends upon physical position, it may be acquired simply through "tacking". With such "House-that-Jack-built" reasoning the orbit of the Board's jurisdiction

will be so far extended as to include not only every industry of any importance, but a host of activities which have been regarded from time immemorial as local and entirely unconnected with "commerce" in its usual sense.

Jurisdiction is also claimed because it is said the interstate shipment of Bunker Hill's products, silver, gold, lead, and copper, may be diminished if there should be a stoppage of work at Petitioner's plant. This Court has many times held that the mere reduction in the supply of an article to be shipped in interstate commerce is ordinarily an indirect and remote obstruction to that commerce, and this rule was created in cases where the product shipped was the product produced.⁵ Certainly where the product shipped is not the one produced, an even stronger presumption of remoteness arises. At any rate, here, as in the case of interstate shipment of supplies or materials, the Board must establish some direct, proximate connection between Petitioner's activities and the shipments by Bunker Hill.

The claim is not supported by the Board's findings of fact. While it is true that jurisdiction may be found even if there is no proof of a reduction of shipments in interstate commerce due to a particular labor disturbance (*Jones &*

⁵ *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 546, 547; *United Leather Workers Intern'l. U. v. Herkert and M. T. Co.*, 265 U. S. 457, 465; *Industrial Assn. v. United States*, 268 U. S. 64, 80; *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 408.

Laughlin case), the Board is nevertheless required to find as a fact that the cessation of production necessarily results in the cessation of the movement of the Bunker Hill's manufactured product in interstate commerce. *National Labor Relations Bd. v. Fainblatt*, 306 U. S. 601, 604, 605. Upon this question, the only finding of the Board is as follows: "We find that the activities of the respondent set forth in Section 3 above, occurring in connection with the operation of the respondent described in Section 1 above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states, and has led and tends to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce." (R. 251.) Section 1 of the findings contains statements concerning the nature, character and extent of Petitioner's operations. In that section there is no statement that a stoppage of work at Petitioner's plant had reduced or would reduce Bunker Hill's shipments. Section 3 relates only to the activities of Petitioner of which complaint is made. Therefore, the foregoing finding is in reality a mere statement that the unfair labor practices of an operator like Petitioner burden and obstruct commerce and the free flow of commerce. This is not a finding of fact, but a mere conclusion of law *Newport News Shipbuilding & Drydock Co. v. Schauffler*, 303 U. S. 54, 57; *Saginaw Broadcasting Co. v. Federal C. Com.*, 96 F. (2d) 554, 560.

The failure of the Board to make a finding with respect to the relation of stoppage of work to cessation of shipments

completely destroys its jurisdiction.⁶

Even if the decision of this Court permitted examination of the record when the findings of fact are insufficient, no evidence would be found that cessation of work at the Petitioner's mine would necessarily result in diminishing Bunker Hill's shipments. There was no evidence that the labor dispute in issue had any effect upon Bunker Hill's activities. In fact, the record is precisely to the contrary. In August, the month of the strike at Petitioner's mine, the shipments of Bunker Hill actually increased over the average before that time (Bd. Exs. 10-C, 10-F, R. 356, 358). Also, in August, Bunker Hill received 230 cars of ore (R. 3050), which was considerably over the average of the three preceding months (May, 176 cars (R. 3049); June, 204 cars (R. 399); July, 199 cars (R. 400)). In the face of such positive evidence, we should not be permitted to guess what may be the effect of cessation of work at Petitioner's mine. It can be said that because some of Bunker Hill's product during some indefinite period of time contains 20 per cent by weight of the matter contained in Petitioner's ore, therefore, if the Petitioner's operations cease, there may be an interruption at some indefinite time in the flow of some of the basic substances contained in the original product. Such an interruption could occur only under circumstances not disclosed by this record—such as, that the interstate shipments by the Bunker Hill were dependent upon Petitioner's continuing its operations, as the instrumentalities

⁶ See cases cited in Brief p. 4).

of interstate commerce were dependent upon the Edison Company (the *Consolidated Edison case* 305 U.S. 197, 220). Such a statement certainly fails to meet the test of direct, immediate, substantial and necessary effect. *National Labor Relations Bd. v. Fainblatt*, 306 U. S. 601, 604. "Courts deal with cases upon the basis of facts disclosed, never with non-existent and assumed circumstances." *Associated Press v. National Labor Relations Bd.*, 301 U. S. 103, 132.

Assuming that the Board had found that cessation of production by Petitioner would diminish interstate shipments of Bunker Hill's product, the relation between Petitioner's activities and interstate commerce would nevertheless be remote, contingent, and merely a "distant repercussion".

Petitioner's product does not at any time move in interstate commerce. The product moved by Bunker Hill in interstate commerce differs substantially in physical and chemical content, quality and value from that produced by Petitioner, and is made so by the active intervening agency of the independent purchaser. The purchaser mingles Petitioner's ore with the ore of many other mines (R. 387, 1947, 1954). All of the commingled ore is consumed in the smelting process and the products finally shipped are only 20 per cent by weight of the original mass (R. 2928). Between the time when Petitioner sells its product to Bunker Hill, and the time when Bunker Hill ships its own product

in interstate commerce, long, varying and indefinite periods elapse. The process of producing silver and other metals from Petitioner's ore itself takes at least three weeks (R. 348) and, in addition thereto, ore purchased from Petitioner remains in Bunker Hill's bin from one to six months or longer before it is converted (R. 1931, 1956, 1958). Petitioner at no time has any interest in or control over that product (R. 1930, 1933, 1942-3, 1958-60). There is no way of knowing how much of the metal produced from the commingled mass of ores comes from ore purchased from Petitioner, nor what happens to the metal, nor for how much it was sold, nor where it was sold (R. 1930, 1944, 1955, 1957-8).

The decisions of this Court under the Act fix what must inevitably be the limit of the Board's jurisdiction as far as shipments of the manufactured product are concerned. In the *Jones & Laughlin* case, the product finally shipped in interstate commerce was the product of the person charged with violation of the Act and no change was made in it after it left his hands. In the *Fainblatt* case the product finally shipped was that made by the Fainblatts, of whose operations jurisdiction was sought. In the *Bradford Dyeing Assn.* case, the manufacturer's product moved immediately in interstate commerce; and the same may be said of the products involved in *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49, 53, 54; *National Labor Relations Board v. Friedman-Harry Mark Clothing Co.*, 301 U. S. 58, 72, 73.

In the *Jones & Laughlin* case, this Court said that it is

the effect on interstate commerce which is important and not the source of the injury; in the instant case, no relation to interstate commerce can be found even by tracing Bunker Hill's product to its original source. If such tracing may be done, the Board will have jurisdiction of every source and every operation which has contributed to the making of a product ultimately shipped in interstate commerce, no matter how remote. Petitioner's ore is consumed in the smelting process. So far as Petitioner is concerned, the ultimate consumer of its product is Bunker Hill. It is true that the product shipped by Bunker Hill contains some elements of Petitioner's product, but any product always contains elements of other products. Petitioner's product is related to the product shipped by physical and chemical laws, and not otherwise. The only proximity is that Petitioner's activities lie next to those of one who is subject to the Act, but, as in the case of interstate purchase of supplies, if jurisdiction may be acquired through such proximity it may be traced through intervening operations and changes in the original product indefinitely to furnish totally unlimited jurisdiction.

There is, of course, a relation between smelting and the mining of ore, but, as a matter of practical experience, they are independent activities. Many concerns are engaged in nothing but smelting and others only in mining. The two operations differ materially. The men who work at the plant of a concern like Bunker Hill have different skills from those engaged in the mining of ore. The work

of the men at the Bunker Hill plant is not purely formal, mechanical, temporary, and incidental; it is fundamental. It involves the addition of chemicals, chemical reactions, absorption of materials, and loss of weight (80%) through a complicated catalytic process which finally results in an entire breakdown of Petitioner's product into various end products—silver, gold, lead and copper dross. It is not properly described as "processing", though various processes are used. It is in a real and legal sense manufacture, for "manufacture is transformation—the fashioning of raw materials into a change of form for use." *Kidd v. Pearson*, 128 U. S. 1, 20. See, also, *Utah-Idaho Sugar Co. v. Federal Trade Com.*, 22 F. (2d) 122, 124-6, where the transformation of beets into beet sugar was held to be manufacture. "To find immediacy here is to find it almost everywhere," for there can be no more fundamental break in the chain of causation than that through which a new product is manufactured, and there can be no more important manufacture than the conversion of raw materials into articles of commerce. This view was expressed in 39 Columbia Law Review, 818, 834, 835, where in relation to a situation similar to that in the instant case, after discussion of the *Jones & Laughlin*, *Santa Cruz* and *Fainblatt* cases, the writer says: "It seems likely that the Court will consider such an effect too remote." (Citing *National Labor Relations Board v. Idaho-Maryland Mines*, 98 F. (2d) 129).

While the *Idaho-Maryland Mines* case is distinguishable, as the government made no sales in commerce, the

Ninth Circuit Court nevertheless said that the result would have been the same if the government's activities had been commercial, and this case has been generally viewed as being applicable to intervening manufacture.⁷ The decision must therefore be viewed as in point, and in conflict with the instant case.

Giving due weight to such differences as there may be between the rate, tax, Sherman Act, and "stream of commerce" cases and the instant case, they nevertheless do emphasize the limits of interstate power so plainly indicated in the decisions of this Court arising under the National Labor Relations Act. The line is quite clearly drawn in *Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 151, 152 and *Baltimore & O. R. Co. v. United States*, 15 Fed. Supp. 674, 676. In the *Baltimore & O. R. Co.* case, Judge Learned Hand said: "The determining factor, as we take it, was that the raw material was made into a new article at the stop; it can hardly have been crucial how long that took, though undoubtedly the length of time required was striking." The *Arkadelphia* case seems close authority for Petitioner's position because it distinguishes the case of *Swift & Co. v. United States*, 196 U. S. 375, upon which *Stafford v. Wallace*, 258 U. S. 495, was based, the court even going so far as to say, with respect to the *Swift* case and other cases cited in *Stafford v. Wallace*, that the distinction "is so evident that particular analysis may be

⁷ 52 Harvard L. Rev. 658; 39 Columbia L. Rev. 934; 37 Mich. L. Rev. 938.

dispensed with." (p. 152). The *Arkadelphia* case is cited in *United Leather Workers Intern'l. Union v. Herkert and M. T. Co.*, 265 U. S. 457, 465, as affirming the "indirect effect" rule established by *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 408.

Cases like *Southern Pacific Terminal Co. v. Interstate Commerce Com.*, 219 U. S. 497, are based on factual situations much different from the instant case, for there the product was "in" interstate commerce; there was an actual interstate movement. The cases nevertheless do indicate that even where the interstate journey has begun the interstate power stops when there is a change in the product unconnected with the purposes of the transportation itself, or where there is a substantial intervening period during which the shipper handles the product for purposes unconnected with transportation. In the *Southern Pacific Terminal Co.* case, *supra*, the processing was for the purpose of furthering the transportation of substantially the same product; it was a simple operation, and the continuity of transport was only temporarily stopped. In *McFadden v. Ala. Great Southern R. Co.*, 241 F. 562, 566, the court said that the concentration of cotton at the railroad's presses did not end the transportation, "but rather indicated the contrary, that compression to reduce bulk, being a thing desired and a right reserved when transportation was intended to be continued, the stop at Birmingham . . . was merely the interruption necessary to prepare the cotton for a journey to be continued"; saying, further: "It was, how-

ever, but an incident in the transportation of a commodity of that kind,"; citing the *Southern Pacific Terminal Co.* case. See, also, *State of Texas v. Anderson, Clayton & Co.*, 92 F. (2d) 104, 107. And, in *Missouri Pac. R. Co. v. Schnipper*, 56 F. (2d) 30, 31, 32, a shipper attempting to obtain the privilege of stopover in transit for creosoting treatment of ties was held to have lost that privilege because he held the ties for an indefinite period of time before creosoting, the ties being held for seasoning so that they could be creosoted, being then separated into seasoned and unseasoned ties, and the creosoted ties being held by the shipper thereafter until needed to meet his maintenance and construction requirements. The point was that the purposes for which the owner withdrew the ties from commerce were not incidental to, or connected with the transportation or the means used therefor, but were merely to enable him to make better use of the ties.⁸

So here, Bunker Hill consults its own business interests in converting Petitioner's product. What it does is not incidental to transportation, either in nature or point of time. Bunker Hill's plant is not merely a point of rest for Petitioner's product; it is, in fact, a point of extinction.

The principles applicable where there is a substantial change in the product are applicable also where intrastate

⁸ See, also, *Bacon v. Illinois*, 227 U.S. 502, 513, 514; and *General Oil Co. v. Crain*, 209 U. S. 211, 229, 230.

activities are divorced from interstate commerce, as they are in this case, through the complete transfer of title of Petitioner's product to Bunker Hill.

When complete title to and possession of the goods is handed to a purchaser within the state, and the seller has no connection with or control over a subsequent movement, interstate or otherwise, and the purchaser, suiting his own convenience and dependent upon his own business relations, ships the goods later through interstate commerce to his own customers, there is no case which hooks up the transportation or sale to the purchaser with interstate commerce or permits regulation of the activities of the seller. The point is brought out clearly by *McCluskey v. Missouri Valley & N. R. Co.*, 243 U. S. 36, 38-40, where the court distinguishes *Texas & Nor. Co. v. Sabine Tram Co.*, 227 U. S. 111, *Southern Pacific Terminal v. Interstate Commerce Com.*, *supra* and *Railroad Com. v. Worthington*, 225 U. S. 101. In the *McCluskey* case a logging railroad, over which its owner carried its own logs in its own cars from its own timber land within the state to a tidewater point, also within the state, where such logs were dumped into the water and sold, some of them going to points outside the state, was held not to be engaged in interstate commerce. To the same effect see *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 520; *Arkadelphia Milling Co. v. St. Louis S. W. R. Co.*, 249 U. S. 134, 151, 152; *Coe v. Errol*, 116 U. S. 517, 527-8.

The *Santa Cruz* case itself confirms the distinction

noted in these cases, for in that case the employees brought under the Act actually handled the shipments, putting the goods "directly into the equipment of the principal carriers." (303 U. S. at page 461). Obviously, the fact that there was a technical transfer of title had nothing to do with the actual movement. The goods were not in fact taken into the possession of the purchaser within the state. As the court said, there "the actual movement is interstate." (p. 463). In the *Fainblatt* and *Bradford Dyeing Assn.* cases, the movement of the goods, even with the intervening processing, was at all times under the control and direction of the owner, and the goods which were finally shipped were "put up" for interstate shipment by the processor, who it may fairly be said was the direct motive power introducing the goods into the channels of interstate commerce. The *Fainblatt* case necessarily limits the doctrine to "the manufacturer who regularly ships his product in interstate commerce" (306 U.S. 601, 608).

It is no answer to say that the *Santa Cruz* case held that "sales to purchasers in another state are not withdrawn from Federal control because the goods are delivered f. o. b. at stated points within the state of origin for transportation" (p. 463). In the first place, the Court said: "and the place where the manufacturer makes his sales is not controlling if the sales *in fact are in interstate commerce*". (p. 465). And in each one of the cases relied on in the *Santa Cruz* case, the basis of the decision was, as stated in *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 466,

"If the actual movement is interstate, the power of Congress attaches to it and provisions of the Act to regulate commerce invoked for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, applies." In such cases, the court will not allow a mere change of title by billing to interrupt the transit or prevent Federal power from attaching. In *Texas & Nor. Co. v. Sabine Tram Co.*, *supra*, cited also in the *Santa Cruz* case, the limitation of the doctrine with respect to change in billing is made clear by its distinction of *Gulf C. & S. F. R. Co. v. Texas*, 204 U. S. 403. The controlling fact in the latter case was that the intra-state movement was independent of the interstate movement and its independence consisted of the acquirement of full title and control of the product shipped by the company which reshipped it. The fact is that the transfer of title in such cases is but an incident—often purely a formal incident—of the transportation itself.

Though probably an extreme case in its facts⁹, the *Consolidated Edison* case was based on the same close physical connection with interstate movement as is found in the *Santa Cruz*, *Fainblatt* and *Bradford Dyeing Assn.* cases where the product of the manufacturer itself moved

⁹ See 37 Mich. L. Rev. 938-40, where the note writer said: "The difficulties in setting adequate boundaries to the Board's jurisdiction once the principle of the *Edison* case is fully accepted, in addition to the dubious propriety of thus widening the scope of Federal regulatory power, militates strongly against the extension of the theory of that case much beyond its facts upon which the decision is supportable".

in interstate commerce. In the *Edison* case, instead of the actual movement of goods in interstate carriers, there was a direct physical connection between the cessation of the Edison Company's activities and the operation of instrumentalities of interstate commerce which were dependent upon the Edison Company's power (305 U. S. 197, 220). It was conclusively shown that if there was an interruption through industrial strife of the service of the petitioning companies, "instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electrical energy, would be greatly impeded." It is little wonder that the court said: "Such effects we cannot regard as indirect and remote." (p. 221). In *United States v. Rock Royal Co-operative*, 307 U. S. 533, 568-9, the commodity (milk) was bought for use beyond state lines and its sale was held to be part of interstate commerce, the marketing of the milk being inextricably intermingled with the marketing in the area of milk which moved across state lines. Under such circumstances, Federal Power to regulate sales was upheld.

In the instant case, on the other hand, there is no "immediate" effect of any kind, no impending catastrophe, no interstate movement or sale of a manufactured product, no connection with interstate instrumentalities, no "inex-

tricable mingling" with the interstate transportation of similar products, no effect on others beyond the borders of the state or those engaged in the same business and moving their products interstate; in short, there is nothing but an independent, local activity whose connection, if any, with interstate commerce is purely incidental and contingent. Intervening between the activities of Petitioner and interstate commerce are (1) extinction or complete conversion of the product; (2) long and varying periods of time; (3) complete transfer of title and control; (4) an independent actor engaged in a different business. If the presence of these elements does not make an activity "remote", it is hard to conceive of anything that will.¹⁰

Since Petitioner's product never moves in interstate commerce and there is no showing that instrumentalities of commerce depend upon a continuance of its activities nor that the interstate shipments of the Bunker Hill are so dependent, there is no connection between those activities and interstate commerce, unless it be contended that possible withdrawal of some of Petitioner's raw material will have some effect on the interstate market for silver, gold, copper or lead. This obviously remote effect has no foundation in the record and was repudiated by this Court in the *Schechter* case. (295 U. S. at pages 520-1, 542-50). Certainly under the circumstances here disclosed the activities

¹⁰ In 52 Harvard L. Rev., 646, 648, the writer says: "It is difficult to find a direct effect where the goods are subject to further manufacturing or processing by the intermediary."

of Petitioner fail completely to meet the requirement that a direct, immediate and substantial effect upon interstate commerce must "clearly appear."

The application of the Federal power in cases like the one before this Court may be defended upon the ground that there is now no local industry; that our modern complex industrial system is necessarily national. 47 Harvard L. Rev., 1365. In fact, it has been suggested that "the doubt now is whether there are any limits on the Board's jurisdiction in the industrial or commercial spheres." 51 Harvard L. Rev. 1123. Simple as such solutions are and attractive as they may be to those primarily interested in economic theory, the framers of the Constitution certainly never intended that the states should have the power to regulate inherently local industry, if at all, only in the most trivial cases.

Petitioner, throughout the difficulties which gave rise to this litigation and thereafter, has guided its course upon the supposition that despite the contrary suggestion of an occasional erudite law writer there are constitutional limitations upon the Board's jurisdiction of industry. Petitioner believes that unless the hypothesis of a completely centralized government be accepted the facts of this case furnish but flimsy foundation for the exercise of Federal power. The decisions of this Court, properly articulated, have already pointed out the limits of Federal jurisdiction, and those limits may here be convincingly applied to pre-

vent further attempts by administrative bodies to obliterate the constitutional distinction between what is national and what is local. The alternative, Petitioner submits, is to give the Board practically unlimited jurisdiction over labor relations, "in subversion of the fundamental principle of the Constitution."

II. THERE IS DEPRIVATION OF DUE PROCESS OF LAW AND LACK OF SUBSTANTIAL EVIDENCE TO SUSTAIN FINDINGS UPON QUESTIONS OF UNIT, MAJORITY, AND REFUSAL TO BARGAIN.

The Board and the Circuit Court held that Petitioner had refused to bargain with the Union as the exclusive representative of all of its mine and mill employees, excluding supervisory, technical, and clerical employees, though no one had ever requested bargaining rights for such unit, no charge had ever so claimed, and no complaint so alleged. No notice was ever given that the Board or any one else so contended. No evidence was introduced with reference to any such claim.

Basically, this case involves the application of a few fundamental doctrines of law to the undisputed facts.

On June 28, 1937, a committee of nine men, three representing Local 18, three representing Local 14 and three representing the International Union (R. 435), called on Petitioner (R. 434). The committee was led by one McGuire, the only member of the committee who testified,

and it demanded that Petitioner recognize and bargain with the International Union as the exclusive bargaining agent for *all* of Petitioner's employees.

McGuire testified the Union demanded "representation of all the employees of said mine" (R. 437); that it demanded to be recognized as "the sole collective bargaining agent of all the employees of the Sunshine Mining Company" (R. 475-6).

"Q Did the committee, as such, ask the management that they be the sole bargaining agency for the Sunshine Mining employees at that time? . . .

"A That question was asked at all meetings." (McGuire, R. 493).

Petitioner's witnesses testified to the same effect, that the Union wished "to be the SOLE REPRESENTATIVES of all Sunshine employees" (Resp. Ex. 76, R. 2839); that the "Union had petitioned the National Labor Relations Board to be certified as the bargaining agency for all of the Sunshine employees" (R. 2902).

The Union's demands were presented in the form of a written contract (R. 436), and the only discussion which took place was with reference to that contract (R. 436, 437, 438; Bd. Ex. 20, R. 440, 442, 443, 470, 471, 473).

The contract (Bd. Ex. 19, R. 448) spoke for itself: it was to cover "rates of wages, hours of labor, and other conditions of employment, of all men employed in and about the plants of the Company" (R. 448-9).

It provided that Petitioner "hereby recognizes the International Union . . . as the representative of all of the employees of the Company for the purpose of collective bargaining" (R. 449-50), and that "The Company agrees to employ only members of the Union in good standing." (R. 450)

There was never any modification of this demand (R. 497). It was recognized by the attorneys for the Board to be the only demand, as shown by the following question they asked: "Q. Had you, in the meantime, read the Wagner Act in the event, Mr. Leisk, you refused to recognize the Union as the sole collective bargaining agent *for all the employees of the company?*" (R. 2926).

The only refusal ever made by Petitioner was a refusal to recognize the Union as the sole and exclusive representative of all of its employees. As stated by McGuire, the Union organizer, the Petitioner "would not recognize the Union as the bargaining agent of all the employees of the Sunshine Mining Company" (R. 443), and "would not recognize the Union as the sole collective bargaining agent of all the employees of the Sunshine Mining Company" (R. 475-6), and "would not recognize the union as the collective bargaining agent of all the employees of the Sunshine Mining Company." (R. 493-4).

Petitioner's refusal was based openly and frankly on two grounds: first, it doubted the fact of the Unions' majority status; second, it doubted the applicability of the Act to it.

The Board's witness, McGuire, testified that at the first meeting between the Union committee and the Petitioner,

"In the discussion of Article No. 1, which deals with the union's right to collective bargaining and representation of all the employees of said mine as the bargaining agent, Mr. Leisk stated that he doubted that the Union had a majority of the employees of the Sunshine Mining Company" (R. 437),

and

"At the meeting of June 28th Mr. Leisk stated that he did not believe—he doubted that the Union had a majority of the employees" (R. 493).

See, also, Record, page 473.

McGuire testified further that at said meeting Leisk stated the Act did not apply to Petitioner. In addition, Petitioner wrote the Board early in July that it did not believe that its activities were subject to federal regulation (Resp. Ex. 101, 103; R. 2911, 2914-5).

No evidence to support the Union's claim of a majority was ever submitted to Petitioner (R. 2813, 2826, 2868), though at all times it doubted the majority status of the Union (R. 2816-7).

On July 15, 1937, the Union filed a petition with the Board to be certified as the sole and exclusive representative of *all* of Petitioner's employees (R. 446, 2902) and the Board sent one of its representatives to investigate this petition, and charges that had been made in June. After some investigation he informed Petitioner of the charges

and the petition for certification, and, with reference to the charges, said "that there was not any use in his going into an investigation of the complaint until the question of the status of the company as regards jurisdiction of the Board had been determined" (R. 2903), and "that there was a question as to the jurisdiction of the Board" in this case (R. 2902).

With reference to the representation proceedings, he told Petitioner that there were two courses open, "to agree to a consent election", or to "leave the matter to the Board to determine by its regular procedure whether or not an election would be ordered" by it (R. 2902-3). He further stated that Petitioner was wholly within its rights in choosing either course, and that he could appreciate why it would choose the regular procedure (R. 2903). At that time the Board would not certify the victor in a consent election as the representative of a proper unit (R. 3101).

After due consideration Petitioner decided that it would be better for the Board to hold its regular proceedings under Section 9 of the Act. Petitioner's position is well expressed in Respondent's Exhibit 76, Record 2840, where, after calling attention to the Union's demand to represent all employees, it is said:

"5. As a result the Labor Board has made two suggestions to the company as follows:

a. That a consent election be conducted by the Board without any investigation of the merits of the petition, or

- b. That the Board proceed along the lines provided by law to conduct a hearing to determine whether an election shall be ordered.
6. The company prefers that the Board take the latter course. (b).
7. The union not satisfied to have the question of election determined by regular procedure of the board has ordered the strike vote."

It will be noted that at all times the only unit specified by the Union was that of *all* the employees, and that this was the unit designated in their petition as provided in the Board's Rules (Art. III, Sec. 2(3), Appendix to Petition, p. x), a wholly proper unit by the plain terms of the statute (Sec. 9(b) and 2(3)), and a unit which included all of petitioner's employees who were eligible for union membership (Bd. Ex. 59, R. 1179), i. e., "all persons working in and around all mines . . . mills", etc. (R. 1179-80), including all supervisory, clerical and technical employees, as well as all the rest of Petitioner's employees except officials and executives (R. 1182). It was solely with reference to this admittedly proper unit that Petitioner refused to bargain.

Up to this time all parties, Unions, Board, and Petitioner, were in agreement as to what constituted the proper unit. The only issue was: Did the International Union represent a majority of all of the employees.

Petitioner was aware of the duty imposed upon it by the Act and this court's opinion in the *Jones and Laughlin*

case (301 U. S. 1, 44) not to deal with any minority group, and the rule enunciated by the Ninth Circuit that Petitioner was "required . . . to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act" (*National Labor Relations Board v. Union Pacific Stages*, 99 F. (2d) 153, 159). Petitioner believed that by agreeing to a regular statutory proceeding, it was performing its duty as declared by the statute and the decisions of the court.

Thereupon the Union struck, and the Board found that the strike was caused by Petitioner's refusal to recognize and "bargain collectively with the Union as the exclusive representative of its employees in an appropriate bargaining unit" (R. 237). What that unit was the Board studiously refrained from finding.

Thereafter and while the strike was still pending (R. 14, 89, 2883), the International Union filed an amended charge (R. 1), in which it alleged that the appropriate unit was *all* the employees, that *all* the employees were represented by a joint committee of the two locals which were affiliated with it, and that petitioner had refused to recognize and bargain with such joint committee as the exclusive representative of *all* of its employees (R. 4).

After investigation, and in purported compliance with the statutory mandate to "issue and cause to be served . . . a complaint stating the charges" (Sec. 10(b)), the Board

served its complaint (R. 8). It alleged that the only labor organizations involved were Locals 14 and 18 (R. 10), that the unit appropriate for collective bargaining was *all the employees*, excluding "supervisory officials, executives, technicians, office employees" (R. 10), that a majority of this unit was represented by "Locals 14 and 18, jointly" (R. 11), and that Petitioner had refused to bargain with said Locals 14 and 18 as such exclusive representative (R. 11, 12).

Here the unit was changed from "*all employees*" to "*all employees*" less the supervisory officials and executives (who are not employees under the statute), and less technical and office employees (who are employees under the statute).

To this complaint, in pursuance to the statute, Petitioner answered and joined issue as follows: As to the unit, it admitted that the proper unit was all its employees, excluding supervisory officials and executives, but denied that the technical and office employees should be excluded (R. 30). In other words, the unit for which bargaining had been demanded, the unit described in the proposed contract, the unit for which certification was requested, and the unit mentioned in the charge, was agreed to be the proper unit. Petitioner joined issue only upon the Board's claim that the technical and office help should also be excluded.

In its answer Petitioner denied that the two local unions represented and had ever demanded bargaining

rights for the unit described (R. 31, 32).

Upon these issues the hearing was held. During the course thereof the Board repeatedly stated that the above issues were the only issues as far as unit, representation and refusal to bargain were concerned (R. 977-8, 813, 854, 920, 936).

The only evidence at the hearing upon the issues of the proper unit, and of whether or not a majority of the employees had selected a representative, was:

1. The constitution of the Union (Bd. Ex. 59, R. 1179);
2. Lists of the members of Locals 14 and 18 and of employees who had designated either one of the locals or the International as bargaining agent (Bd. Exs. 51 and 52, R. 1005, 1034), without any designation of the employment of such persons;
3. Petitioner's payrolls for June 28, 1937 (Bd. Ex. 54, R. 1043), July 9, 1937 (Bd. Ex. 55, R. 1063), July 31, 1937 (Bd. Ex. 56, R. 1082) and August 2, 1937 (Bd. Ex. 57, R. 1106), without any designation of the occupation of the men listed thereon; and
4. An exhibit explaining these payrolls, showing the names of mine shift bosses, mine foremen, shaft jiggers, department heads, and a few other employees who did not turn in daily time cards, but who were on the payroll (Bd. Ex. 54A, R. 1158).

That there was no question of any different unit from

that of "all employees" is clearly shown by the procedure adopted in submitting evidence of the Union's claim of majority representation. A great deal of time was taken in checking Petitioner's payrolls against the Union records, and *vice versa*, but absolutely no attention was given to the employee's particular occupation or job.

According to the procedure followed at first, which was agreed on by all parties and the examiner, the Union secretaries read the names of the men they claimed, and Petitioner's timekeeper consulted the payroll to see if the claimed member was an employee (R. 602-3, see, also, R. 595-6)—all without any attention as to the employee's job.

This checking procedure was evidently not very satisfactory, so the Board had each union prepare an exhibit which showed all of its claims as to membership and bargaining designations (R. 1003, 1033), and these were finally introduced in evidence by the Board as Exhibits 51 and 52. These were immediately followed by the total payrolls of Petitioner (Bd. Ex. 53-57), and that is the only evidence as to the majority representation of the unit. It showed nothing as to the "mine and mill employees".

The Big Creek Industrial Union was allowed to intervene in the proceedings (R. 64), and it alleged that it represented, first, a majority of all of Petitioner's employees, and second, a majority of its mine and mill employees (R. 56, 72, 73, 78). The only issue raised at the hearing, with reference to mine and mill employees, was whether or not

they were represented by the Big Creek Union at the time of the hearing in September and October, 1937, and the Board refused to recognize this issue in any way whatsoever.

The evidence in support of this claim was the August 15, 1937, payroll of 419 employees (Resp. Ex. 62, R. 2106); the membership lists of the Big Creek of its members who had worked before the strike (Stipulation R. 2119-27, names R. 2128-37, Int. Ex. 11, R. 2226-35); the list of those working before the strike who, while not joining the Big Creek, had designated it as their agent (Int. Ex. 14, R. 3019); and the membership and designation lists of the Big Creek of men who had been hired after August 10, 1937 (Int. Ex. 27, 52, R. 3025 and 3033). The names and jobs of all men included therein are designated on these lists. They included the names of only 126 men claimed by the unions, and of these 126 (included in Bd. Ex. 51 and 52, R. 1005, 1034), 16 were not "mine and mill employees", and 1 Harris Fraser, was a shaft jigger or supervisory employee (Bd. Ex. 54A, R. 1158).

From these exhibits it appears that, in addition to mine and mill employees, Petitioner's employees include: surface workers, machine shop employees, clerical workers, engineers, electric shop workers, watchmen, truck drivers, shovel runners, assayers, carpenters, blacksmiths, janitors in dry, truck helpers, painters, plumbers, general handy men, ore samplers, stenographers, accountants and time keepers.

The occupations of the men claimed by the Union other than the 126 above mentioned do not appear; some may have been mine and mill employees, or all may not have been, but the record does not show whom. With the possible exception of the Big Creek Union, no one cared what their occupations were, since no issue had been raised on that point.

All this evidence was treated by the Board as being wholly immaterial since it did not consider membership of the Big Creek an issue (R. 1992). The only evidence which it recognized referred to union membership, as of June 28, July 9, and August 2, 1937 (R. 1992-3). (The Big Creek was not organized until August 20, 1937 (Resp. Ex. 114, R. 1833, 2141)).

As to the representative of Petitioner's employees, there was no claim made in the charge or the complaint, nor any attempt to prove by evidence that the International Union was a representative of a majority. The Board repeatedly specifically stated that the only issue was as to whether or not a majority of the employees had selected the two locals jointly (R. 977-8, 813, 854, 920, 936).

When the International Union filed the charge and alleged under oath that a joint committee of the two locals represented a majority of all employees, it was judicially admitting that it did not represent the unit (R. 4).

After the hearing, when the Board's amended complaint was filed to conform with the evidence (R. 82, 2956-8), the

proper unit was still "all the employees", less "supervisory officials, executives, technicians, office employees" (R. 85). The only labor organizations involved were still "Locals 14 and 18" (R. 85). The majority of the employees had still designated "Locals 14 and 18, jointly, as their representative" (R. 86). It was still only such locals which had made the request to bargain, and it was still only that request, by said locals for such unit, which Petitioner had allegedly refused to grant (R. 86-7).

In January, 1938, the intermediate Report was filed (R. 97-139). It referred exclusively to the unit alleged in the complaint, that is, "all employees" less "supervisory officials, executives, technicians and office employees" (R. 124, 130), and completely failed to consider the nature of any employee's job or individual work.

This demonstrates conclusively which unit was in question and that there was no evidence to sustain a finding with regard to any other than "all employees." That was the only issue of which Petitioner had notice or an opportunity to meet.

Then, on July 1, 1938 (R. 260-1), Petitioner was served with the Board's order (R. 214), which completely misstated the pleadings and the record. It found that the complaint alleged that Petitioner had refused to deal with the International Union (R. 214), an untrue statement, and it listed the International Union and the Big Creek Union as the only labor organizations involved (R. 221-2), (though

in all the pleadings and at the hearing the International was not in question). It found that the International admitted "to its membership the mine and mill employees of the respondent", but that the Big Creek admitted "to its membership all the respondent's employees, including supervisory employees, who are not given any voting rights" (R. 222),—a palpable misstatement.

The only evidence in the record as to the membership requirement of the International Union, is Board's Exhibit 59, the constitution of the International Union, and this exhibit shows that ALL of Petitioner's employees are eligible for membership, with the possible exception of Mr. Leisk, the general manager. Every one of Petitioner's employees would be entitled to full voting membership in the International Union except Mr. Graham, the general mine foreman (R. 1179-80, 1182). The Big Creek membership, contrary to the Board's finding, was actually far more limited (R. 1840).

It is impossible to view this misstatement of the record with tolerance. It is impossible to pass it as a "mistake". It seems apparent that the Board made this false finding as a basis for its later finding that the International Union represented a majority of Petitioner's mine and mill employees.

The mechanics of this studied torturing of the record is clear,—the record shows the job classifications of all of Petitioner's employees, except the job classification of the

Union's members (Resp. Ex. 62, R. 2106; Int. Ex. 11, R. 2226; Int. Ex. 14, R. 3019-20; Int. Ex. 27, R. 3025; Int. Ex. 52, R. 3033). Listed on Exhibit 62 are 126, on Intervenor's Exhibit 11 are 90, on Intervenor's Exhibit 14 are 2, and on Intervenor's Exhibit 27 are 2 names who are not mine and mill employees.

By changing all men claimed by the Union into "mine and mill employees", the Board could deduct from the balance of the employees those who were not mine and mill employees, and by this process support its findings of a majority by "substantial evidence". However, it overlooked its own Exhibit 59, the constitution of the International Union (R. 1179-82), which shows conclusively that all Union members are not necessarily mine and mill employees.

Not satisfied with these erroneous findings, the Board proceeded to misstate the allegations of the complaint as to the unit, finding:

"It is alleged in the complaint that the respondent's name (sic) mine and mill employees, excluding supervisory, clerical, and technical employees, constitute a unit appropriate for the purposes of collective bargaining. The respondent urged that the appropriate unit should include office and technical employees" (R. 227).

No such allegations are contained in any pleading.

This finding was made to create an illusion that Petitioner and the Board had agreed that the "mine and mill" employees was the proper unit and that there was an issue

raised with reference to mine and mill employees, and the further illusion that Petitioner and the Board had agreed that "supervisory employees" should be excluded. No such claim had been made, though Petitioner did agree with the charge and the complaints that "supervisory officials and executives" (who are not employees under the statute) should be excluded from the unit of "all employees".

The Board, further attempting to bolster its conclusion as to "mine and mill" employees, found: "The mine and mill employees are paid on a daily or shift basis, while office and technical employees are paid on a regular salary basis" (R. 227).

This is simply a half truth. ALL of Petitioner's employees except technical and office employees and supervisory officials and executives, are paid on a daily basis, including all supervisory employees.

Piling error upon error in its efforts to lay the basis for placing employees in the "mine-mill" classification, the Board again deliberately found:

"The respondent itself recognizes that a distinction exists between the mill and mine employees and the clerical and technical employees by carrying them on separate pay rolls" (R. 227).

This is simply a false statement. All employees except supervisory officials, executives, technical and office employees, but including all *supervisory employees*, are carried on one payroll.

By these findings the Board completed the foundation for its determination of a majority.

But it had still another hurdle to pass—the nature of the demand made by the Union to represent “all” of the employees. It therefore proceeded against all evidence and the pleadings, to find, “the unit advocated by the Union and alleged in the complaint as appropriate” (R. 227), adding that the “evidence does not disclose any reason for departing from the unit claimed by the Union” (R. 228).

The Union had never claimed that any such unit was proper. It had claimed that the proper unit was “all the employees”. Neither the charge, the complaint, the amended complaint, nor the intermediate report had ever alleged or even referred to such a unit, and no such unit had ever before been brought into the case.

Upon that shifting and untenable basis the Board found as a conclusion of fact, that the “mine and mill employees, excluding supervisory, clerical, and technical employees” was the proper unit (R. 228).

This error as to the unit was carried along throughout the findings. On page 230 the Board said: “This check discloses that on June 28, 1937, the Union represented approximately 300 employees in the *appropriate unit*”. There is not a scintilla of evidence to support such a finding, not a word of testimony as to how many employees there were in the “appropriate unit” referred to by the Board, not a single piece of evidence as to how many of the members of

the local unions or the International Union were "mine and mill employees".

The same studied and careful disregard of the record was shown by the Board in considering whether there had been a refusal to bargain. It found as follows: "McGuire stated that the Union represented a majority of the respondent's employees and submitted two copies of a proposed agreement. Leisk stated that he doubted the Union represented a majority of the respondent's employees" (R. 234).

On this finding and one that thereafter Petitioner refused to bargain, the Board then determined that Petitioner "has refused to bargain collectively with the Unions as the exclusive representative of its employees in an *appropriate bargaining unit*" (R. 237), and "that the strike of August 2, 1937, was caused by the respondent's unlawful refusal to bargain."

It will be noted that the Board studiously avoided making any finding as to the unit for whom the demand for bargaining rights was made. It did not find that any demand or request was made to bargain with the appropriate unit established by it. It did not find that any one represented a majority in the unit for which bargaining was demanded.

The Board was confronted with documentary and testimonial evidence that the only bargaining right ever requested was "FOR ALL THE EMPLOYEES". It could

not find as a fact that the Unions represented a majority of that unit so it simply failed to make any findings at all with reference to that point.

However, the Board did find that the unit for which the Union demanded bargaining rights was "an appropriate bargaining unit" (R. 237). Since the Union had demanded bargaining rights only for "all the employees", the Board must therefore have concluded that "**ALL OF THE EMPLOYEES OF PETITIONER" WAS AN APPROPRIATE UNIT.** Only one request to bargain was ever made, and that was to bargain for all the employees. Only one refusal to bargain was made, and that was a refusal to bargain with the International Union as the exclusive representative of all of Petitioner's employees. When it found, therefore, that Petitioner refused to bargain with the Union "as the exclusive representative of its employees in an appropriate unit" it necessarily found that "all of the employees" was an appropriate unit.

The Union made a demand to be recognized as the exclusive bargaining representative of an appropriate unit; its rights to speak for that appropriate unit were questioned; and thereafter its demand was refused. This was followed by a strike, which strike was caused solely by that refusal.

Thereafter that unit was entirely forgotten. Yet Petitioner is found guilty of refusing to bargain with the Union for a unit it never heard of, for refusing to do that

which it was never asked to do. And the record conclusively establishes that the refusal Petitioner did make was proper, because the Union did not represent a majority in the unit for which it sought to bargain.

Upon the question of the proper unit, the designation of a representative, whether or not a majority had selected a representative, and whether or not Petitioner ever refused to bargain with a representative selected by a majority of its employees is an appropriate unit, this is the record. It clearly appears therefrom that Petitioner was not given notice of, nor afforded a hearing upon the charges of which the Board found it guilty.

There was no evidence nor issue to sustain its determination of what was the appropriate unit, to support its findings that the Union represented a majority of the mine and mill employees, or to fortify its holding that Petitioner refused to bargain with the Union as the exclusive bargaining agent of its mine and mill employees.

This Court has held that to constitute substantial evidence, it must be such as would sustain a refusal to grant a new trial in a case tried to a jury. *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, 343. It must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229. ". . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion

sought to be drawn from it is one of fact for the jury".
National Labor Relations Board v. Columbian E. & S. Co.,
306 U. S. 292, 300.

In this case the findings as to unit, majority, and refusal to bargain fail by a great margin to meet the test of substantiality.

The following is a summary of this record:

Petitioner had no opportunity to show:

- (a) That the mine and mill workers was not a proper unit.
- (b) That the Union did not represent such unit in June, July or August, 1937, or at the time of the hearing in September and October, 1937.

There is no evidence, substantial or otherwise, to support the following findings of the Board:

- (a) That the "mine and mill employees" was a proper unit.
- (b) That the Union represented a majority of such employees in June, July or August, 1937, or at the time of the hearing.
- (c) That the Union requested or demanded bargaining rights for such unit.
- (d) That Petitioner refused to bargain with the Union as the exclusive representative of the employees in such unit.

On the contrary, the record does show without contradiction:

- (a) That the Union demanded bargaining rights for all of Petitioner's employees (Board made no finding).
- (b) That Petitioner refused to recognize the Union as the exclusive bargaining representative of *all of its employees*. (Board made no finding).
- (c) That the Union did not represent a majority of all Petitioner's employees. (Board made no finding).
- (d) That "all of the employees" constituted a proper unit. (The Board so found (R. 237)).
- (e) That at the time of the hearing a majority of any or all possible units was then represented by the Big Creek. (The Board made no finding).

No issue was formed, hearing had, nor notice given with reference to the following matters on which the Board made findings:

- (a) Whether or not the "mine and mill employees" was a proper unit.
- (b) Whether or not supervisory "employees" should be excluded from any unit.
- (c) Whether or not the International Union had ever requested bargaining rights for any unit, and whether Petitioner refused to recognize it as the representative for any unit.

(d) Whether the International Union represented any of Petitioner's employees individually, or a majority of its employees in any unit.

(e) Whether any union represented a majority of Petitioner's mine and mill employees, or had ever requested bargaining rights for a unit composed of such "mine and mill" employees, less exclusions.

The Board made no findings upon the following issues raised by the pleadings:

(a) Whether, from the admittedly proper unit of "all the employees excluding supervisory officials and executives", there should also be excluded the "technical and office" employees.

(b) Whether such a unit was in fact or in law a proper unit.

(c) Whether Locals 14 and 18 represented a majority of the employees in such unit, at any time.

(d) Whether Petitioner refused to recognize Locals 14 and 18 as the exclusive bargaining agent of such unit.

(e) Whether, if Petitioner did so refuse, such refusal was wrongful.

This court has clearly delineated the requirements of due process. (See cases cited in Petition, pp. 31-4). Measured by that standard, the Petitioner has been denied every vestige of a fair hearing.

If an employer in a Labor Board case is entitled to such a fair hearing, and if the Board's findings must be sustained by substantial evidence, then the following parts of the Board's order must be set aside:

1(c), which orders Petitioner to cease and desist from refusing to bargain with the International Union as the exclusive representative of its mine and mill employees (R. 267).

2(c), which orders Petitioner to bargain with the International Union as the representative of the mine and mill employees and reduce the agreement, if one is reached, to writing (R. 268-9).

2(e), in part, which requires the posting of notices with reference to the International Union (R. 269).

Petitioner respectfully submits that the writ should issue.

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